Datuk M Kayveas (as Public Officer for Parti Progresif Penduduk Malaysia Baru (PPP)) v Chong Chek Ah & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-1913 OF 2010
HAMID SULTAN J
27 APRIL 2011

Companies and Corporations — Shares — Trust — Whether company shares held by first defendant on constructive trust for plaintiff — Whether sale and transfer of shares by first defendant to fourth defendant void

Evidence — Witness — Credibility of — Assessment of credibility based on demeanor — Whether witness evasive, not consistent and slow in giving answers — Whether a witness of truth

Trusts and Trustees — Constructive trust — Property — Shares in company — Whether established — Whether company shares held by first defendant on constructive trust for plaintiff — Whether sale and transfer of shares to fourth defendant void

The plaintiff was in occupation of a building known as Wisma PPP ('the property') as early as 1998. The plaintiff wanted to purchase the said property which was charged to EON Bank by the owners of the property, SBL Travel Sdn Bhd. Subsequently the property came for auction and the plaintiff decided to buy it under the name of the fifth defendant which was an investment arm of the plaintiff. The original shareholders of the fifth defendant were two members and nominees of PPP. The plaintiff purchased the property for the sum of RM2,673,000 and a sum of RM267,300 was paid by the plaintiff through the fifth defendant. The balance purchase price was advanced by the first defendant as a loan to the plaintiff who then paid it through the fifth defendant. On or about 17 March 2005 the shares of the fifth defendant were transferred to the first defendant and his nominees namely the second and third defendants on trust pending the repayment of the friendly loan to the first defendant. There was no consideration paid by the first to third defendants for the said shares. The plaintiff alleged that the first defendant in breach of trust had purportedly entered into a share sale agreement dated 29 November 2005 wherein the first to third defendants had transferred the shares to the fourth defendant. According to the plaintiff, a sum of RM1,800,000 had been repaid to the first defendant on several occasions and the balance sum due and payable was RM605,000. In addition the plaintiff said that from the date of purchase

of the property they had not paid any rentals to anybody and they had been paying all assessments etc to the relevant authorities and were in possession of the receipts. The plaintiff also asserted that at all material times after the purchase, the plaintiff was keeping in custody the document of title of the said property, and they had applied for a copy when the original was lost. Hence, the plaintiff in this suit sought, inter alia, declarations that the share sale agreement dated 29 November 2005 was null and void, that the transfer of the shares to the fourth defendant was void and that the shares be retransferred to the plaintiff's nominees.

Held, allowing the plaintiff's claim in part and dismissing the second and third defendants' counterclaim:

(1) The evidence of PW1 to PW4 was consistent to the pleaded case and/or agreed issues to be tried. PW1's evidence was corroborated by documents as well as possession of the title to the said property as well as the fact that they did not pay any rental from the year 2003 ie from the date the property was purchased from the auction till date and that they have been paying assessment etc. The plaintiff's witnesses were witnesses of truth and their evidence must be accepted (see para 23(a)).

(2) The defendants' witnesses' evidences were not corroborated. No evidence was led to show any payment of money was paid for the shares despite notice to produce the relevant documents. There were a number of discrepancies in the share sale agreement and share transfer to conclude it was a fictitious sale. There was also no rational explanation how they secured the title and why they had lodged a caveat on the said property. Their version lacked credibility. In addition their evidence was evasive and/or they responded very slowly to material questions in cross-examination. They were not witnesses of truth (see para 23(b)(II) & (III)).

(3) There was unrebutted evidence that it was the plaintiff who paid the purchase price very importantly the deposit sum of RM267,300; and the balance sum of RM2,405,700 was paid by the plaintiff from the loan obtained from the first defendant; and the fifth defendant's shares were transferred to the first defendant and his nominees on trust. There was no evidence from the fourth to seventh defendants to show that they actually paid for the property or for the purchase of shares in the fifth defendant (see para 23(b)(IV)).

(4) The plaintiff had discharged the burden of proof on a balance of probabilities as to the existence of the trust via both documentary evidence as well as oral evidence. The doctrine of constructive trust was applicable in the instant case to provide the relief as prayed against the fourth, sixth and seventh defendants (see para 27).

(5) The overall conduct of the fourth defendant and the documentations, enquires before purchase etc, were not consistent in relation to a purchase of a property or shares in a company which held property — which was occupied by the plaintiff and not the purported vendors of the share sale agreement. In contrast the conduct of the plaintiff in possession of the said property, not paying rental and paying assessment etc was consistent with the conduct of a genuine purchaser or beneficial owner. Conduct of parties, are relevant in such cases and are given much importance in the Evidence Act 1950 which the court is obliged to take into account in the assessment of evidence (see para 28).

[Bahasa Malaysia summary

Plaintif telah mendiami bangunan yang dikenali sebagai Wisma PPP ('hartanah') sejak tahun 1998. Plaintif ingin membeli hartanah tersebut yang telah dicagar ke EON Bank oleh pemilik-pemilik hartanah, SBL Travel Sdn Bhd. Berikutan itu hartanah itu telah dilelong dan plaintif membuat keputusan membelinya di bawah nama defendan kelima yang merupakan cabang pelaburan plaintif. Pemegang saham asal defendan kelima merupakan dua ahli dan calon PPP. Plaintif telah membeli hartanah itu untuk sejumlah RM2,673,000 dan sejumlah RM267,300 telah dibayar oleh plaintif melalui defendan kelima. Baki harga belian telah didahulukan oleh defendan pertama sebagai pinjaman kepada plaintif yang kemudian telah membayarnya melalui defendan kelima. Pada 17 Mac 2005 saham-saham defendan kelima telah dipindahmilik kepada defendan pertama dan calonnya iaitu defendan-defendan kedua dan ketiga atas amanah sementara menunggu bayaran balik pinjaman persahabatan kepada defendan pertama. Tiada balasan yang dibayar oleh defendan-defendan pertama hingga ketiga untuk saham-saham tersebut. Plaintif mengatakan bahawa defendan pertama telah melanggar amanah yang mana perjanjian jualan saham bertarikh 29 November 2005 telah dimasuki di mana defendan-defendan pertama hingga ketiga telah memindah milik saham-saham tersebut kepada defendan keempat. Menurut plaintif, sejumlah RM1,800,000 telah dibayar balik kepada defendan pertama dalam beberapa ansuran dan baki jumlah yang tertunggak dan perlu dibayar adalah RM605,000. Tambahan pula plaintif mengatakan bahawa dari tarikh belian hartanah itu mereka tidak membayar apa-apa sewa kepada sesiapa dan mereka telah membayar semua taksiran dan lain-lain kepada pihak berkuasa berkaitan dan memiliki resit-resit tersebut. Plaintif juga menegaskan bahawa pada setiap masa matan selepas belian itu, plaintif mempunyai jagaan surat ikatan hak milik hartanah tersebut, dan mereka telah meminta salinan apabila yang asal hilang. Justeru itu, plaintif dalam guaman ini memohon, antara lain, deklarasi bahawa perjanjian jualan saham bertarikh 29 November 2005 terbatal dan tak sah, bahawa pindahmilik saham-saham kepada defendan keempat tak sah dan bahawa saham-saham tersebut dipindahmilik semula kepada calon-calon plaintif.

Diputuskan, membenarkan sebahagian tuntutan plaintif dan menolak tuntutan balas defendan-defendan kedua dan ketiga:

(1) Keterangan PW1 hingga PW4 adalah konsisten dalam kes yang diplid dan/atau isu-isu yang dipersetujui untuk dibicarakan. Keterangan PW1 telah disokong oleh dokumen-dokumen dan juga milikan hak milik ke atas hartanah tersebut juga fakta bahawa mereka tidak membayar apa-apa sewa sejak tahun 2003 iaitu dari tarikh hartanah itu dibeli dari lelongan hingga kini dan bahawa mereka telah membayar taksiran dan lain-lain. Saksi-saksi plaintif boleh dipercayai dan keterangan mereka patut diterima (lihat perenggan 23(a)).

(2) Keterangan-keterangan saksi-saksi defendan-defendan tidak disokong. Tiada keterangan menunjukkan apa-apa bayaran telah dibuat untuk saham-saham itu meskipun notis untuk mengemukakan dokumen-dokumen relevan. Beberapa percanggahan dalam perjanjian jualan saham dan pindahmilik saham membawa kepada kesimpulan bahawa jualan itu satu rekaan. Tiada penjelasan rasional bagaimana mereka memperoleh hak milik itu dan kenapa mereka memasukkan kaveat ke atas hartanah tersebut. Versi mereka sukar dipercayai. Tambahan pula keterangan mereka bersifat mengelak dan/atau mereka bertindak lambat menjawab soalan material dalam pemeriksaan balas. Mereka bukan saksi-saksi yang boleh dipercayai (lihat perenggan 23(b)(II) & (III)).

(3) Wujud keterangan yang tidak dipatahkan bahawa ia adalah plaintif yang telah membayar harga belian dan paling penting jumlah deposit RM267,300, dan baki jumlah RM2,405,700 yang dibayar oleh plaintif daripada pinjaman yang diperoleh daripada defendan pertama, dan saham-saham defendan kelima telah dipindahmilik kepada defendan pertama dan calon-calonnya atas amanah. Tiada keterangan daripada defendan-defendan keempat hingga ketujuh untuk menunjukkan bahawa mereka sebenarnya yang telah membayar untuk hartanah tersebut atau untuk belian saham-saham dalam defendan kelima (lihat perenggan 23(b)(IV)).

(4) Plaintif telah melepaskan beban bukti atas imbangan kebarangkalian berhubung kewujudan kebenaran melalui kedua-dua keterangan dokumentar dan juga keterangan lisan. Doktrin amanah konstruktif adalah terpakai dalam kes ini bagi memperuntukkan relief sebagaimana yang dipohon terhadap defendan-defendan keempat, keenam dan ketujuh (lihat perenggan 27).

(5) Keseluruhan perlakuan defendan keempat dan pendokumenan, siasatan sebelum belian dan lain-lain, tidak konsisten berkaitan belian hartanah atau saham-saham dalam syarikat yang memegang hartanah – yang didiami oleh plaintif dan bukan pembeli-pembeli perjanjian jualan

saham yang dikatakan itu. Sebaliknya perlakuan plaintif yang memiliki hartanah tersebut, tidak membayar sewa dan membayar taksiran dan lain-lain adalah konsisten dengan perlakuan pembeli sebenar atau pemilik benefisiari. Perlakuan pihak-pihak, adalah relevan dalam kes-kes sebegini dan amat penting dalam Akta Keterangan 1950 yang mana mahkamah wajar mengambilkira dalam membuat penilaian keterangan (lihat perenggan 28).]

Notes

For cases on credibility of, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3029–3086.

For cases on property, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2283–2286.

For cases on trust, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 924–926.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Cheun & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd)

Alliance Bank Malaysia Bhd v Sail bin Yalang [2010] 7 MLJ 316; [2010] 4 CLJ 963, [2009] 1 LNS 951, HC (refd)

Bank Simpanan Nasional v I-Power Berhad [2010] 3 MLJ 633; [2010] 1 LNS 791, HC (refd)

Banque Nasionale De Paris v Wuan Swee May & Anor [2000] 3 MLJ 587; [2000] 4 CLJ 387, HC (refd)

Bar Malaysia v HF Vitality (Malaysia) Sdn Bhd [2003] 5 MLJ 145; [2003] 1 CLJ 810, HC (refd)

Barclays Bank Plc v O'Brien and Another [1993] 4 All ER 417, HL (refd)

Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Bujang bin Haji Ulis v Nancy bte Abdullah (Imas anak Blanda & Anor as proposed interveners) [2007] 4 MLJ 363; [2007] 8 CLJ 255, HC (refd)

Chan Yoke Lain v Pacific and Orient Insurance [1999] 1 MLJ 303; [1999] 1 CLJ 179, CA (refd)

Choong Kwee Sang v Choong Kwee Keong [2009] 1 MLJ 186; [2008] 5 CLJ 229, CA (refd)

Chow Kay Kong v Ching Tong & Ors [1967] 2 MLJ 31, FC (refd)

David Wong Hon Leong v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)

Dr K Shanmuganathan (Suing By His Attorney Dr A Puravippan) v Periasamy Sithambaram Pillai [1994] 2 CLJ 225, HC (refd)

Dyer v Dyer (1788) 2 Cox Eq Cas 92 (refd)

ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005] 2 MLJ 422, CA (refd)

Eastern & Oriental Hotel [1951] Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)
Eastern Enterprise Ltd v Ong Choo Kim [1969] 1 MLJ 236 (refd)
Elspan v Eurocopter [1999] NSWSC 555, CA (refd)
Glamour Green Sdn Bhd v Ambank Bhd & Ors & Another Appeal [2007] 3 CLJ 413, CA (refd)
Guthrie Waugh Bhd v Malaippan Muthucumaru [1972] 1 MLJ 35 (refd)
Hameeda Bee v Mrs P Seenivasagam [1950] MLJ 267, CA (refd)
Hoo Lin Coln v Wong Weng Woh & Anor [2007] 1 MLJ 56; [2006] 3 CLJ 939, HC (refd)
Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 221, HC (refd)
Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627 (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ (Rep)1, PC (refd)
Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170, PC (refd)
Khoo Kim Hock, Re [1974] 2 MLJ 30 (refd)
Kondapuram Raghuram v Soo Peng & Ors [2006] 7 MLJ 510; [2006] 5 CLJ 634, HC (refd)
Lau Hieng Yee, Re [2000] 1 MLJ 59; [1999] 4 CLJ 582, HC (refd)
Lau Keen Fai v Lim Ban Kay & Lim Chiam Boon [2011] 3 CLJ 213, HC (refd)
Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh Mamat & Ors [2009] 4 MLJ 610; [2009] 5 CLJ 1, CA (refd)
Lim Chui Lai v Zeno Limited [1964] MLJ 314, FC (refd)
Lim Soh Meng & Anor v Krishnan [1967] 1 MLJ 8, FC (refd)
Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor [1976] 2 MLJ 177 (refd)
Michael Atun Wee v Malaysian Credit Finance Berhad & Ors [1994] 4 CLJ 798 (refd)
Ming & Co v Leong Ping Ching [1964] MLJ 312 (refd)
Phiong Khon v Chonh Chai Fah [1970] 2 MLJ 114 (refd)
Public Finance Bhd v Scoth Leasing Sdn Bhd [1996] 2 MLJ 369; [1996] 3 CLJ 635, FC (refd)
Sang Lee Company Sdn Bhd v Suburamaniammayawan & Ors [2011] 5 MLJ 374; [2011] 1 CLJ 167 [2010] 1 LNS 1204, CA (refd)
Selvaduray v Chinniah [1939] 8 MLJ 253, CA (refd)
Seymour v Australian Broadcasting Commission (1977) 19 NSWLR 219 (refd)
Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo [2010] 3 MLJ 633; [2010] 5 CLJ 427, CA (refd)
Synn Lee & Co Ltd v Bank of China [1962] MLJ 395, CA (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)
Tay Choon Foo v Tengku Mohd Saad [2009] 1 MLJ 289; [2009] 2 CLJ 363, CA (refd)
Tenaga Nasional Berhad v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673, HC (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)
Westdeuthsche Landesbank Gironzentrale v Islington London Borough Council [1996] 2 All ER 961, HL (refd)
Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin [1977] 2 MLJ 487, CA (refd)
Yamaha Motors Co Ltd v Yamaha (M) Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] CLJ Rep 428, FC (refd)

Legislation referred to

Bankruptcy Act 1967 s 38(1)(a)
Rules of the High Court 1980 O 13 r 6, O 19 r 7

Menon (M Mugunthan with him) (Jaffar & Menon) for the plaintiff.
Hung Beng Guan for the second defendant.
Jacqueline (Jacqueline Lau & Co) for the third defendant.
Paari Perumal (Joseph Yeo with him) (Joseph Yeo) for the fourth to seventh defendants.

Hamid Sultan J:

[1] This is my judgment in respect of the plaintiff's claim relating to the property in dispute known as Wisma PPP with a grant No 27024 Lot 522 Section 69, Bandar Kuala Lumpur, Wilayah Persekutuan ('property') which was purchased by the plaintiff under the name of the fifth defendant and was held on trust by the fifth defendant which was originally the investment company of the plaintiff; and it was transferred by the plaintiff to the first defendant and his nominees who are the second and third defendants to be held on trust for the plaintiff; and the said fifth defendant was to transfer back to the plaintiff upon the payment of a loan advanced by the first defendant to the plaintiff for the purchase of the said property. And the plaintiff's claim against the fourth, sixth and seventh defendants in essence is that the fifth defendant's shares had been wrongfully acquired by them and in consequence it has to be transferred back to the plaintiff and/or nominees.

This judgment in essence will deal with the agreed issues to be tried as agreed by the plaintiff and the fourth to seventh defendants. The judgment also deals with the second and third defendants' counterclaim. The prayers in the statement of claim, inter alia, read as follows:

(a) A declaration that the share sale and purchase agreement dated 29 November 2005 is null and void.

(b) A declaration that the share transfer certificate dated 12 November 2007 transferring shares of the first, second and third defendants in the fifth defendant to the fourth defendant is void for misrepresentation that the considerations for the transfer of shares are RM98,998, RM1 and RM1 each together with the non-payment of the correct stamp duty.

(c) Following the cancellation of the share sale and purchase agreement dated 29 November 2005, the shares that are registered in the name of the sixth and seventh defendants are to be transferred to the names of the plaintiffs committee members whom shall be named within seven days of the order of this court.

(d) Whilst awaiting the trial and final determination of the plaintiff's claim herein, an order maintaining the status quo of the plaintiff's ownership and occupation of the said property be maintained.

(e) An order that the proceedings of the Kuala Lumpur Sessions Court Suit No 1–52–38119 of 2008 be stayed until the determination of this case.

(f) Whilst awaiting the trial and final determination of the plaintiff's claim, an injunction to restrict the fourth, fifth, sixth and seventh defendants or anyone related to the defendants from dealing, divesting, selling and or in any way obstructing/damaging the said property and a caveat to be entered onto the said property.

(g) For the purposes of signing any transfer or documents pertaining to the transfer of shares in the fifth defendant to the plaintiff's representative, that the assistant registrar of the High Court be given the authority to do so in the event parties that ought to do so fail thereto within seven days of the said order.

(h) Costs in the cause.

(i) Any other order that this honourable court deems necessary and just.

EVIDENTIAL ISSUES

[2] It is crucial to note that the factual matrix relating to evidence and burden of proof in the instant case are not directly on point or similar to cases cited by the defendants for various reasons namely:

(a) In the instant case the fourth to seventh defendants in para 5 of the statement of defence had admitted that the said property was purchased by the fifth defendant. In consequence the real issue for determination, inter alia, appears to be whether the fourth defendant's purchase of the shares of the fifth defendant was a bona fide transaction.

(b) On the issue of bona fide, inter alia, it must be noted that the plaintiff had, just one or two weeks before the trial of this action, filed an application to amend the statement of claim to include a complaint to the Bar Council Disciplinary Committee relating to non-permissible money lending transaction in which the fourth defendant, See Hong Chen ('DW1'), who was the main witness for the fourth to seventh defendants, was involved. And that part of the proposed amendment, inter alia, reads as follows:

Paragraph 46 of encl 37:

> Sometime … in September/October I have executed/signed certain agreements with one SeeHong Chen in the office of the, said lawyer, Mr Lau Keen Fai. I too in December 2004 executed/signed certain agreements and certain share certificate transfer forms of a company known as 'Tian Soon Agriculture Sdn Bhd in favour of one See Hong Chen and both the said agreements and the said transfer forms are kept in escrow by the said solicitor who acted for me and the said See Hong Chen.
>
> Till to date despite repeated request and personally calling to the said solicitor's office for a stamped copy of the said agreements executed by me the said solicitor has not extended a copy to me.
>
> On the 19.5.05 I through a solicitor caused a notice dated 19.5.05 to the said solicitor for a copy of the same and till to date the said solicitor has not replied to my solicitor's notice dated 19.5.05. A copy of the said notice is enclosed for your reference.

Paragraph 49 of encl 37:

> The DC. found that the complainant had proved beyond reasonable doubt that:
>
> (a) The, appellant had drawn up three sale and purchase agreements to cover up the, actual transactions which were a loan of RM2 million in respect of the 22 titles and & RM6.5 million in respect of the 300.000 shares.
>
> (b) The appellant had transferred the 22 tiles to See Hong Chen & Sons Sdn Bhd when the complainant had paid See RM 10.2 million for the loan of RM8.5 million, and had not returned the 300,000 shares to the complainant.
>
> (c) The act of the appellant was not only dishonest but fraudulent conduct in the discharge of his duties.
>
> (d) Drawing up sham sale and purchase agreements to cover up the actual transaction of money lending with pledging of land titles and share certificates as security for the loans is in fact committing fraud.
>
> (e) As a result of this fraud the complainant suffered loss of the 22 titles.
>
> (f) The appellant perpetrated the fraud till the very end.
>
> The DC found the complainant a reliable and truthful witness but the DC found the appellant evasive and most of his answers were denials. The DC found that the transactions between the complainant and See Hong Chen were in fact money lending transactions with pledging of securities and not sale and purchase transactions. The DC also felt that the appellant knew the actual nature of the transactions.

[3] Notwithstanding, the four to seventh defendants' solicitors in the instant case were also representing the relevant persons before the disciplinary committee, the fourth to seventh defendants through the solicitors objected to the amendment. In consequence I made a ruling that I will not consider the application at that stage as the trial has been fixed in the subsequent week but

I placed on record that the plaintiff may adduce any relevant evidence in the event it relates to illegal transaction or its like and the defendants' solicitors consented to the same.

[4] Further it must be noted that:

(a) The first defendant is a material witness not only for the plaintiff but also for the fourth to seventh defendants. The first defendant did not enter appearance and the plaintiff had, on many occasions during case management stage, requested a default order against the first defendant but I had informed them it is not proper to do so as the relief claimed is not a liquidated sum. I have dealt with this area of jurisprudence in the case of *Bujang bin Haji Ulis v Nancy bte Abdullah (Imas anak Blanda & Anor as proposed interveners)* [2007] 4 MLJ 363; [2007] 8 CLJ 255. I do not wish to repeat the same.

(b) The plaintiff had also subpoenaed the first defendant and despite the subpoena being served the first defendant did not attend court to give evidence.

(c) The fourth to seventh defendants had full knowledge that the first defendant had not entered appearance. Despite such knowledge they have not subpoenaed the first defendant or ensured that the first defendant gives evidence in support of their defence.

[5] In addition it must be noted that the fourth to seventh defendants did not subpoena a material witness for the defence that is the lawyer, Lau Keen Fai, though the plaintiff had subpoenaed but was not able to serve on him. Further, despite the plaintiff's notice to produce (encl 45) all relevant documents in possession of the relevant defendants — they have failed to do so.

[6] It is also relevant to note that the fifth defendant's paid up share capital is limited to RM100,000 and has no business activities. In consequence it will have no financial capacity to purchase and own the disputed property. And the nominees of the first defendant namely the second and third defendants (who were the directors of the fifth defendant) had categorically stated that they did not receive any money for the transfer of shares. This issue is relevant and material to the issue of bona fide of the transaction and also the fact relating to the trust. It must also be noted that the first to third defendants did not pay for the allotment of shares in the fifth defendant when it was transferred to them from the plaintiff's nominees. All this in my view will assist to support the proposition that there was a trust.

[7] The second and third defendants were represented by one set of solicitors who on or before trial discharged themselves as solicitors for the second defendant who had also filed a counterclaim. The second and third defendants

A are only nominees of the first defendant who did not give evidence to oppose the plaintiff's case in a substantial manner as they did not have personal knowledge of the plaintiff's agreement with the the first defendant. The fourth to seventh defendants were represented by one set of solicitors and had agreed to the issues to be tried by the plaintiff which read as follows:

B

(i) Whether the plaintiff through the fifth defendant had paid RM267,300 being the deposit for the purchase of the property known as grant No 27024 Lot 522 Section 69, Kuala Lumpur, Wilayah Persekutuan to the assistant registrar High Court.

C

(iii) Whether the plaintiff through the fifth defendant had paid RM2,405,700 being the balance purchase price to the assistant registrar High Court for the purchase of the property known as grant No 27024 Lot 522 Section 69, Kuala Lumpur, Wilayah Persekutuan to the assistant registrar High Court.

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(iv) Whether the plaintiff borrowed RM2,405,700 from the first defendant to pay the balance purchase price for the purchase of the said property.

(v) Whether the shares in the fifth defendant originally vested in the nominees of the plaintiff.

(vi) Whether the plaintiff transferred its share in the fifth defendant to the first,

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second and third defendants to be held on trust pending repayment of the plaintiffs loan to the first defendant.

(vii) Whether the plaintiff is the beneficial owner of the property know as grant No 27024 Lot 522 Section 69, Kuala Lumpur, Wilayah Persekutuan.

F

(viii) Whether the share sale agreement dated 29 November 2005 is null and void.

(ix) Whether the first, second and third defendants committed breach of trust and conversion by transferring their shares in the fifth defendant to the fourth defendant.

(x) Whether the transfer of shares of the first, second and third defendants in the

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fifth defendant to the fourth defendant is null and void.

(xi) Whether the fourth defendant is a bona fide purchaser of the shares of the first, second and third defendants in the fifth defendant,

(xii) Whether Messrs Rajah Lau & Associates acted for the plaintiff in the auction

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It must also be noted that the issues between the plaintiff and the fourth to seventh defendants had been narrowed down and in consequence the defendants' submission relating to fraud, conspiracy etc in reliance of the statement of claim is misconceived. I am also mindful of the argument raised

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by the defendants that the first defendant was made a bankrupt sometime in the year 2009 and as a result he could not have entered appearance and defend the action. On the facts and the relief claimed I find the argument misconceived for the following reasons namely:

(a) There is no prohibition in law for a bankrupt to give evidence.

(b) The plaintiff's submission in reliance of the case of *Re Khoo Kim Hock* [1974] 2 MLJ 29 has merits. That part of the submission reads as follows:

> The plaintiff submits that the first defendant does not need the sanction of the official assignee pursuant to s 38(1)(a) of the Bankruptcy Act 1967 because the plaintiff is seeking declaratory relief from this honourable court and not liquidated or unliquidated damages from the first defendant which touch on the property of the bankrupt. Neither are the fourth–seventh defendants' solicitors acting for the first defendant to make statements on behalf of the first defendant.

(c) Section 38(1)(a) of the Bankruptcy Act 1967 reads as follows:

> the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

In *Re Khoo Kim Hock* Mohamed Azmi J (as he then was) made the following observations:

> The exception contained within brackets in s 38(1)(a) clearly indicates that the section is intended to apply only to actions for recovery of something — either real or personal–which can be turned into assets such as a claim for recovery of property or money due.

Further the court stated:

> The word 'property' is defined by s 2 to include money, goods, things in action, land and every description of property, whether real or personal, obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined. 'As such, only property as defined above would vest in the official assignee at the time of adjudication, and from the definition, unless something can be turned into an asset for payment of debts to the creditors it cannot be described as property within the meaning of s 2. The present application being not things in action or chose in action cannot be described as something which can be turned into asset for the estate of the bankrupt.'

BRIEF FACTS

[8] The plaintiff was in occupation of the property as early as 1998. The plaintiff wanted to purchase the said property which was charged to EON Bank by the owners of the property, SBL Travel Sdn Bhd. Subsequently the property came for auction and the plaintiff decided to buy it under the name of the fifth defendant which is said to have been incorporated as an investment arm of the plaintiff with the original shareholders namely Datuk M Kayveas and B Vijayandran a/l Balasingham who are members of PPP and the nominees of PPP were also the shareholders and directors of the fifth defendant at the time the property was purchased.

[9] The plaintiff purchased the property for the sum of RM2,673,000 and a sum of RM267,300 was paid by the plaintiff through the fifth defendant and the balance purchase price was also paid through the fifth defendant on or about 26 December 2003. And the balance purchase price has been advanced by the first defendant as a loan to the plaintiff who has caused it to pay through the fifth defendant. The solicitors acting in respect of the transaction was Messrs Rajah Lau & Associates.

[10] On or about 17 March 2005 the shares of the fifth defendant were transferred to the first defendant and his nominees namely the second and third defendants on trust pending the repayment of the friendly loan to the first defendant as pleaded in the statement of claim. The first defendant held 99,998 shares and the second and third defendant held one share each totaling 100,000 shares of RM1 each. There was no consideration paid by the first, to third defendants for the said shares when it was transferred by the plaintiffs nominees to the first defendant and his nominees.

[11] It is the allegation of the plaintiff that the first defendant in breach of trust has purportedly entered into a share sale agreement dated 29 November 2005 wherein the first to third defendants had transferred the shares to the fourth defendant (see exh P13–encl 24 at pp 157–163).

[12] The shares were actually transferred to the fourth defendant nearly two years later, that is to say on or about 12 November 2007 (see exhs P14, P15 and P16–encl 24 at pp 164–166).

[13] The plaintiff says a sum of RM1,800,000 has been repaid to the first defendant on several occasions and the balance sum due and payable is RM605,000. In addition the plaintiff says that from the date of purchase of the property they have not paid any rentals to anybody and they have been paying all assessments etc to the relevant authorities and are in possession of the receipts (see exhs P9–P10).

[14] And the plaintiff complains that they only came to know of the breach of trust when the fourth defendant after the purported purchase of the shares in the fifth defendant had caused the fifth defendant to file a Suit No 52–38119 of 2008 at the Kuala Lumpur Sessions Court to seek vacant possession and damages for occupying the property. The plaintiff also asserts at all material times after the purchase it was keeping in custody the document of title of the said property, and they have in fact applied for a copy when the original was lost (see exh P18).

[15] It is also the contention of the plaintiff that the first defendant had informed:

(a) The plaintiff that the first defendant has taken a loan from the fourth defendant and used the shares in the fifth defendant as security for a loan.

(b) The sale and purchase agreement to purchase the shares by the fourth defendant was a sham to hide the loan transaction.

(c) When the first defendant could not repay the loan the fourth defendant through his lawyers transferred the shares of the fifth defendant to themselves and there was no actual consideration paid for the shares.

[16] The fourth to seventh defendants' case through their main witness, See Hong Chen (DW1), the managing director of the fourth defendant and the father of the sixth and seventh defendants who are holding the shares in the fifth defendant for the fourth defendant, is as follows:

(a) Sometime in the year 2003 he had given a loan in the sum of RM2,405,700 for the purchase of the said property.

(b) Thereafter the first defendant had repaid the loan to him.

(c) Subsequently in 2005 the first defendant had asked him to buy the said property.

(d) The purchase was to be effected by way of the purchase of entire share capital of the fifth defendant.

(e) He used the fourth defendant to purchase the shares by an agreement dated 29 November 2005 and the purchase price was RM2,500,000.

(f) The shares were only transferred in December 2007 to his son and daughter to replace the second and third defendants who resigned as directors when the shares were transferred. And they too have the title to the said property (see exh D19).

In essence the fourth defendant's case is that it was a bona fide purchaser for value without notice of the plaintiffs rights.

[17] The second and third defendants' defence in essence was that they are nominees of the first defendant and was not aware of the plaintiffs rights; and the counterclaim was not substantiated by evidence, and stood as mere allegations only, which need not be elaborated further.

There are also many side issues which the parties have raised which need not be elaborated in view of the agreed issues and have been dealt with in the evidence and submissions of the respective parties.

PRELIMINARIES

[18] Five witnesses gave evidence for the plaintiff and the second and third defendants gave evidence in person. For the fourth to seventh defendants two witnesses gave evidence inclusive of the seventh defendant. The main witness for the defence case is primarily See Hong Chen (DW1).

[19] At the end of trial I have directed the parties to file a chronology of the evidence and parties have done so. The plaintiff's chronology is marked as encl 51, the second defendant's is marked as encl 53, the third defendant's is marked as encl 52, and the fourth to seventh defendants' is marked as encl 54.

[20] In addition I had requested the parties to address in submissions the following issues namely:

(a) What is the effect of holding titles ie in relation to liens?

(b) Is it proper for the court to consider the proposed amendments to the statement of claim ie are the defendants going to be taken by surprise during the trial?

(c) Share sale agreement and the subsequent transfer where no money was paid — what is the effect of this in law?

(d) Who is telling the truth - the plaintiff or the defendants - is it supported by sufficient evidence?

(e) Who are the material witnesses who need to give evidence for the plaintiff or defendants to establish the case? What is the effect of the first defendant not coming to the court notwithstanding a subpoena has been served? What is the effect of the defendants not calling the first defendant notwithstanding they knew from the beginning that the first defendant has not entered appearance or filed the defence? What is the effect of the fourth to seventh defendants not calling the relevant solicitors or the plaintiff not calling the relevant solicitors?

(f) What were the material documents not produced by the plaintiff or defendants in this case?

(g) Must there be any amendment to the plaintiffs prayers if some relief is granted to the plaintiff?

[21] Learned counsel for the plaintiff in the submissions encl 55 has dealt with the above issues meticulously, for which the court is grateful, and I do not wish to repeat the same save to say that there is merit in the submission. The defendants' submissions on some of the above issues can be found in encls 56 and 58, 59 and 60.

[22] Parties have relied on the following cases: *Sang Lee Company Sdn Bhd v Suburamaniammayawan & Ors* [2011] 5 MLJ 374; [2011] 1 CLJ 167 [2010] 1 LNS 1204; *Alliance Bank Malaysia Bhd v Sail Yalang* [2010] 7 MLJ 316; [2010] 4 CLJ 963 [2009] 1 LNS 951; *Michael Atun Wee v Malaysian Credit Finance Berhad & Ors* [1994] 4 CLJ 798; *Choong Kwee Sang v Choong Kwee Keong* [2009] 1 MLJ 186; [2008] 5 CLJ 229; *Dr K Shanmuganathan (Suing By His Attorney Dr A Puravippan) v Periasamy Sithambaram Pillai* [1994] 2 CLJ

225; *Tenaga Nasional Berhad v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673; *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697; *Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236; *Selvaduray v Chinniah* [1939] 8 MLJ 253; *Eastern & Oriental Hotel [1951] Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35; *Chow Kay Kong v Ching Tong &Ors* [1967] 2 MLJ 31; *Lim Soh Meng & Anor v Krishnan* [1967] 1 MLJ 8; *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; *David Wong Hon Leong v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155; *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219; *Elspan v Eurocopter* [1999] NSWSC 555; *Tindok Besar Estate SdnBhd v Tinjar Co* [1979] 2 MLJ 229; *Hameeda Bee v Mrs P Seenivasagam* [1950] MLJ 267; *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422; *Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin* [1977] 2 MLJ 487; *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221; *Synn Lee & Co Ltd v Bank of China* [1962] MLJ 395; *Khoo Kim Hock, Re* [1974] 2 MLJ 30; *Lau Hieng Yee, Re* [2000] 1 MLJ 59; [1999] 4 CLJ 582; *Westdeutsche v Islington BC* [1996] 2 All ER 961; *Tay Choon Foo v Tengku Mohd Saad* [2009] 2 CLJ 363; *Barclays Bank plc v O'Brien* [1993] 4 All ER 417; *Phiong Khon v Chonh Chai Fah* [1970] 2 MLJ 114; *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* [1976] 2 MLJ 177; *Ming & Co v Leong Ping Ching* [1964] MLJ 312; *Lim Chui Lai v Zeno Limited* [1964] MLJ 314; *Public Finance Bhd v Scoth Leasing Sdn Bhd* [1996] 2 MLJ 369; [1996] 3 CLJ 635; *Glamour Green Sdn Bhd v Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413; *Yamaha Motors Co Ltd v Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ Rep 428; *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ (Rep)1; *Kondapuram Raghuram v Soo Peng & Ors* [2006] 7 MLJ 510; [2006] 5 CLJ 634; *Banque Nasionale De Paris v Wuan Swee May & Anor* [2000] 3 MLJ 587; [2000] 4 CLJ 387; *Lau Keen Fai v Lim Ban Kay & Lim Chiam Boon* [2011] 3 CLJ 213; *Westdeuthsche Landesbank Gironzentrale v Islington London Borough Council* [1996] 2 All ER 961; *Guthrie Waugh Bhd v Malaippan Muthucumaru* [1972] 1 MLJ 35; *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170; *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269; *Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo* [2010] 3 MLJ 633; [2010] 5 CLJ 427; *bank Simpanan Nasional v I-Power Berhad* [2010] 3 MLJ 633; [2010] 1 LNS 791; *Hoo Lin Coln v Wong Weng Woh & Anor* [2007] 1 MLJ 56; [2006] 3 CLJ 939; *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Cheun & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639; *Bar Malaysia v HF Vitality (Malaysia) Sdn Bhd* [2003] 5 MLJ 145; [2003] 1 CLJ 810; *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh Mamat & Ors* [2009] 4 MLJ 610; [2009] 5 CLJ 1; *Chan Yoke Lain v pacific and Orient Insurance* [1999] 1 MLJ 303; [1999] 1 CLJ 179; *Dyer v Dyer* (1788) 2 Cox Eq Cas 92 at p 93.

[23] I have heard the evidence, read the documents and submissions of the parties in detail. Learned counsel for the respective parties have adequately

dealt with all relevant issues in their submissions. It will serve no useful purpose to repeat the same save to deal with the core issues. I take the view after giving much consideration to the submission of learned counsel for the fourth to seventh defendants that the plaintiffs claim must be partly allowed and the second and third defendants' counterclaim must be dismissed. My reasons, inter alia, are as follows:

(a) In the instant case four witnesses gave evidence for the plaintiff namely (a) Datuk M Kayveas ('PW1'); (b) Gnanasambantham a/l Doraisamy ('PW2'); (c) Mohan a/l Akandasamy ('PW3'); (d) Maglin Dennis D'Cruz ('PW4'); and one subpoenaed witness — Kok Yoon Hee ('PW5'). The evidence of PW1 to PW4 was consistent to the pleaded case and/or agreed issues to be tried. The main witness for the plaintiff was PW1. His evidence was corroborated by documents as well as possession of the title to the said property as well as the fact that they did not pay any rental from the year 2003 ie from the date the property was purchased from the auction till date and that they have been paying assessment etc. All this corroborative evidence when it stands unrebutted in law and fact will be strong evidence in favour of the plaintiff. The failure of the first defendant to enter defence and give evidence to challenge the plaintiff's case is fatal to the defendants. In addition despite severe cross-examinations by the fourth to seventh defendants' counsel the plaintiffs evidence was not shaken. In addition I must say that the defendants have failed to cross-examine the plaintiff's witnesses on material issues. In consequence it is my finding that the plaintiffs witnesses are witnesses of truth and their evidence must be accepted.

(b) The main witnesses for the fourth to seventh defendants were (a) See Hong Chen (DW1); (b) See Cherng Jye ('DW2'). Their evidences were not corroborated and there were sufficient gaps to even assume that the fourth defendant is a bona fide purchaser for the value of the shares of the fifth defendant. The gaps and discrepancies have been sufficiently dealt with in the submissions. On my part I will highlight some of the material issues namely:

(i) No evidence was led to show any payment of money was paid for the shares despite notice to produce the relevant documents (encl 45).

(ii) There are a number of discrepancies in the share sale agreement and share transfer to conclude it was a fictitious sale. And there was also no rational explanation how they secured the title marked as exh D19 and why they have lodged a caveat on the said property.

(iii) Their version lacks credibility when the plaintiffs unrebutted case was that they were in occupation from 1998 and did not pay rental from 2003 and were paying all assessment etc; and had lost the

original title and applied for a copy and received the same from land office which is exh 18. In addition their evidence was evasive and/or they responded very slowly to material questions in cross-examination. I also realised that DW1 understood English even though he was assisted by Chinese interpreter. In short it is my finding that they are not witnesses of truth.

(iv) In the instant case there is unrebutted evidence that it was the plaintiff who paid the purchase price very importantly the deposit sum of RM267,300; and the balance sum of RM2,405,700 was paid by the plaintiff from the loan obtained from the first defendant; and the fifth defendant's shares were transferred to the first defendant and his nominees on trust (even though there was evidence to show that the nominees were not aware). It must be noted that there was no evidence from the fourth to seventh defendants to show that they actually paid for the property or for the purchase of shares in the fifth defendant. Learned counsel for the plaintiff says there is a constructive trust and submits as follows:

(I) In *Halsbury's Laws of England*, (4th Ed) Vol 48, a constructive trust is defined as follows:

> A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust which is held by a person in circumstances it would be inequitable to allow him to asset full beneficial ownership of the property. Such a person will often hold other property in a fiduciary capacity and it will by virtue of his ownership of or dealings with that fiduciary property that he acquired the specific property subject to the constructive trust. A stranger who receives property in circumstances where he has actual or constructive notice that is trust property being transferred to him in breach of trust will, however be also constructive trustee of that property.

(II) In *Westdeuthsche Landeshank Gironzentrale v Islington London Borough Council* [1996] 2 All ER 961, Lord Brown Wilkinson observed:

> Once a trust is established, as from its date of establishment the beneficiary has, in equity, a propriety interest in the trust property which propriety interest will be enforceable in equity against any subsequent holder of that property other than the purchaser for value of the legal interest without notice.

(III)In *Toy Choo Foo v Tengku Mohd Saad Tengku Mansur & Ors and Another Appeal* [2009] 2 CLJ 363, a case which involved similar facts as the instant case, the Court of Appeal affirmed the finding of the High Court that the first defendant was a

constructive trustee of the plaintiffs shares due to the fact the first defendant never provided consideration for the transfer of shares from the plaintiff. Ghazali Yusoff JCA (as he then was) observed at para 99:

> The learned judge, based on the evidence before him, found that the transfer of the said shares was not intended to operate as a gift. There was clearly no intention of a gift. The beneficial interest never left the deceased with the result that there was no disposition of that interest in the said shares. Absence of writing does not preclude the deceased as transferor from asserting his entitlement in equity. It is unconscionable after the failure to make payment for the said shares for the first defendant to assert his rights as registered owner of the said shares. He failed to fulfill that condition. A failure of consideration occurred as there has been a failure of performance by the first defendant of his obligation under an arrangement which was initially binding. Under the circumstances the learned judge was correct by way of remedy to impose a constructive trust on the first defendant who knowingly retains property of which the deceased has been unjustly deprived of. The learned judge found that the deceased agreed to sell the said shares to the first defendant at the sum of RM1.2m and that the the first defendant held the said shares on trust for the deceased pending settlement of the purchase price. Thus, the constructive trust have been perceived to have the function of reversing unjust enrichment.

(IV)In *Barclays Bank Plc v O'Brien and Another* [1993] 4 All ER 417, the House of Lords held:

> The doctrine of notice lies at the heart of equity, given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of rights of the other and he fails to make such inquiry or take such other steps as are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it.

[24] Learned counsel says that the fourth defendant is not a bona fide purchaser for value of the shares in the fifth defendant and as the facts are similar to *Toy Choo Foo* case, the court should likewise impose a constructive trust upon the defendants who never paid any consideration.

[25] On this issue learned counsel for the fourth to seventh defendants says there is no evidence that there is a declaration of trust by the fifth defendant in respect of the property and that the defendant has no burden to disprove facts not proven by the plaintiff and relies on a number of cases which has no

relevance to the unique facts of this case where the evidence of the plaintiff stands unrebutted at the stage of plaintiff s case as well as the defendants' case.

[26] The fourth to seventh defendants' reliance on many cases where the facts do not coincide with the facts of this case has no relevance. For example the defendants relied on the case of *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Johor* [1996] 3 MLJ 627 where the issues, inter alia, were whether an individual made representation, if so, whether the burden shifts to the respondent when the appellant failed to serve the subpoena on that individual and whether an adverse inference can be invoked against the respondent. The Court of Appeal had this to say:

> The allegation of the oral representation has been pleaded by the appellant at para 8 of his statement of claim, and denied by the respondent at para 5(a) of its amended statement of defence. He who alleges must prove such allegation and the onus is on the appellant to do so see s 103 of the Evidence Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation, and, secondly, has denied even making one. For this very reason, the adverse inference under s 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s 114(g) is invoked against the appellant.

In the instant case the most material witness for issues relating to the trust is the first defendant. He is not contesting the suit and that makes much difference in respect of the burden of proof as enunciated in a number of cases such as (a) *Hoo Lin Coln v Wong Weng Who & Anor* [2007] 1 MLJ 56; [2006] 3 CLJ 939; (b) *Aik Ming (M) Sdn Bhd & Ors v Chang Chuen & Ors & Another case* [1995] 2 MLJ 770; [1995] 3 CLJ 639; and (c) *Lau Keen Fai v Lim Ban Kay* [2011] 3 CLJ 213. In *Bar Malaysia v HF Vitality (Malaysia) Sdn Bhd* [2003] 5 MLJ 145; [2003] 1 CLJ 810 the court considered the provisions of O 13 r 6 and O 19 r 7 of the Rules of the High Court 1980 and held, inter alia, that the facts pleaded in the statement of claim are to be taken as admitted by the defaulting party. The court made the following observations:

> It must be emphasised that the defendant had not filed its statement of defence and that being the case it was part and parcel of my judgment that the matters alleged in the statement of claim must, in law, stand proved and admitted.

I do not see any reason to disbelieve the cogent evidence of the plaintiffs witnesses which remains unrebutted. In addition Messrs Rajah Lau & Associates in the ordinary course of conveyancing practice must have acted for

A the plaintiff during the auction as they were the purchasers of the property through the fifth defendant which was their investment company at the material time. In addition the PPP nominees as stated earlier were the shareholders and directors of the fifth defendant at the material time.

B

[27] I accept the submission of the plaintiff that the plaintiff has discharged the burden of proof on a balance of probabilities as to the existence of the trust via both documentary evidence as well as oral evidence and I accept the submission of the plaintiff that the doctrine of constructive trust will be applicable in the instant case to provide the relief as prayed against the fourth, sixth and seventh defendants.

C

[28] It is also my finding that the fourth defendant is not a bona fide purchaser for value of the fifth defendant's shares to resist the plaintiff's claim. In this respect it must be noted that it was See Hong Chen's evidence that the first defendant had already repaid the previous loan and subsequently he sold to the fourth defendant but the fourth defendant had produced no evidence of payment to the first defendant and/or nominees or corroborated his oral evidence. In the plaintiff's case the payment for the purchase of the said property was corroborated and also paid directly to the court. It must be asserted here that the overall conduct of the fourth defendant and the documentations, enquires before purchase etc, were not consistent in relation to a purchase of a property or shares in a company which holds property — which is occupied by the plaintiff and not the purported vendors of the share sale agreement. In contrast the conduct of the plaintiff's in possession of the said property, and not paying rental, and paying assessment etc; is consistent with the conduct of a genuine purchaser and/or owner or beneficial owner. Conduct of parties, are relevant in such cases and have been given much importance in the Evidence Act 1950 which the court is obliged to take into account in the assessment of evidence.

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[29] In conclusion my findings on the agreed issues between the parties are as follows:

H

(a) The plaintiff had paid the deposit of RM267,300 for the purchase of the said property.

(b) The plaintiff through the fifth defendant had paid the balance purchase price and the plaintiff had borrowed the said sum from the first defendant.

I

(c) The shares of the fifth defendant originally vested in the nominees of the plaintiff.

(d) The plaintiff had transferred its shares in the fifth defendant to the first defendant and his nominees on trust.

(e) The plaintiff is the beneficial owner of the said property.

(f) The share sale agreement dated 29 November 2005 is null and void.

(g) The first defendant had committed breach of trust.

(h) The transfer of shares to the fourth defendant is null and void.

(i) The fourth defendant is not a bona fide purchaser for value of the shares.

(j) Messrs Rajah Lau & Associates acted for the plaintiff in the auction.

[30] For the reasons stated above I allow prayers (i), (iii) and (vii) of para 51 of the statement of claim with costs to be paid by the fourth defendant with parties be liberty to apply. The second and third defendants' counterclaim is dismissed with no order as to costs as they were only nominees having no real interest in the subject matter. The fourth defendant to pay costs in the sum of RM100,000 to the plaintiff. The order for costs may be extracted as a separate order subject to the payment of allocatur fees. The deputy registrar to issue the certificate relating to the allocatur.

I hereby order so.

Plaintiff's claim allowed in part and second and third defendants' counterclaim dismissed.

Reported by Kanesh Sundrum